No. 16366

In the

United States Court of Appeals

For the Ninth Circuit

JOHN L. OWEN, *Appellant,*

vs.

SEARS, ROEBUCK AND COMPANY,
a corporation, *Appellee.*

Appellee's Brief

Appeal from the United States District Court
for the District of Oregon

HONORABLE WILLIAM G. EAST, District Judge

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JURISDICTION

This is an appeal by John L. Owen, plaintiff below, from a judgment entered by the United States District Court for the District of Oregon after a directed verdict in favor of Sears, Roebuck and Company, a corporation, defendant below, at the close of plaintiff's case in chief (Tr. of Record 15, 16). The action below was com-

menced by a complaint filed for breach of an implied warranty (Tr. of Record 3-5).

The plaintiff below was a citizen of the State of Oregon and the defendant below is a New York corporation (Tr. of Record 7). The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 (Tr. of Record 7).

The United States District Court for the District of Oregon had jurisdiction of this cause by virtue of 28 U.S.C.A., Section 1332.

This court has jurisdiction by virtue of 28 U.S.C.A., Sections 1291 and 1294.

APPELLEE'S STATEMENT OF THE CASE

Appellee agrees with the factual portion of appellant's statement of the case, except insofar as the appellant infers that he had authorized his wife to purchase the allegedly defective shirt from the appellee. The appellant's wife was not authorized by the appellant to purchase the allegedly defective shirt from the appellee (Tr. 59, 73).

Further, the appellee would add that the record shows that appellant gave no notice to the appellee that the appellant intended to assert a claim for damages for breach of warranty until the complaint was filed.

STATEMENT OF POINTS

1. There was no substantial evidence presented in this case from which the jury could have found that the appellee sold a shirt which was not reasonably fit for the purpose intended.

2. There was no substantial evidence presented from which the jury could have found that the shirt in question was sold by the appellee to the appellant.

3. The requirement of reasonable notice of breach of warranty imposed by Oregon Revised Statutes Section 75.490 was not satisfied by the appellant.

4. The appellee did not waive the requirement of reasonable notice imposed by Oregon Revised Statutes Section 75.490.

ARGUMENT

POINT I

The trial court properly directed a verdict in favor of the appellee on the ground that there was no substantial evidence presented from which a jury could have found that appellee sold a shirt which was not reasonably fit for the purpose intended.

The doctrine of res ipsa loquitur does not apply to actions for breach of warranty.

The doctrine of res ipsa loquitur does not apply to actions for breach of warranty. In *Landers v. Safeway Stores, Inc.*, 172 Or. 116, 139 P.2d 788 (1943), plaintiff sued for a breach of warranty in connection with the sale by the defendant to the plaintiff of a bottle of White Magic bleaching solution. Plaintiff was allegedly injured by immersing his hands in the solution while cleaning an article of clothing. The court stated:

> "* * * The complaint shows that the action in this case is based upon alleged breach of warranty and not upon negligence. Furthermore, the instrumentality which is claimed to have produced the injury was in the exclusive possession and control of plaintiff. The doctrine of res ipsa loquitur does not apply to such cases * * *" (citing authorities)

In *Oregon Auto-Dispatch v. Port. Cordage Co.*, 51 Or. 583, 94 Pac. 36, 95 Pac. 498 (1908), plaintiff alleged the purchase of a rope under a warranty that it was strong enough to lower a safe of a given weight from the third story of a given building. The rope allegedly broke and the safe dropped from the third story to the basement, resulting in damage to the safe. The court stated:

> "* * * We do not understand that the maxim 'res ipsa loquitur' has any application to such case. That relates to cases involving negligence * * *"

It is clear from appellant's amended complaint (Tr. of Record 3-5) and from the *pretrial order* (Tr. of Record 7-11) that he brought his action on the theory of breach of warranty. It is further clear from the record that appellant had exclusive possession and control over the allegedly defective shirt from the time of its alleged purchase in May of 1955 until the date on which appellant sustained injuries as a result of appellee's alleged breach of warranty (Tr. 4-6, 44).

Under the Oregon cases cited and quoted above, it is obvious that the doctrine of res ipsa loquitur has no application to the case presently before the court and, therefore, it was incumbent upon the appellant to produce substantial evidence that the shirt purchased from the appellee was not reasonably fit for the purposes intended. *The appellant completely failed to sustain this burden of proof.*

The only evidence presented by the appellant was that the shirt purchased from the appellee burned when it was ignited by the appellant's own apparent carelessness in touching a cigarette or open flame to the shirt. No evidence was presented bearing on the construction of the shirt or the materials from which it was made. No evidence was presented as to the inflammable characteristics of similar shirts. The appellant apparently made no attempt to locate a similar shirt and have it

tested for inflammable characteristics. Furthermore, even though the appellant had the collar of the allegedly defective shirt (Tr. 10), he failed to save that remnant of said shirt and have it tested for inflammable characteristics.

Merely proving that one sustained injuries while using the allegedly defective article will not support a verdict of damages for such injury. *Landers v. Safeway Stores, Inc.* (supra).

In the *Landers* case, the court stated:

> "* * * If * * * the court had instructed the jury that the mere fact alone that plaintiff's hands had been burned would not be sufficient evidence that the burn resulted from a breach of warranty, the instruction would have been free from error * * *"

Another case in point is *Simmons v. Rhodes and Jamieson, Ltd.*, 46 Cal.2d 190, 293 P.2d 26 (1956). Here plaintiff purchased some Readi-Mix cement from defendant Rhodes and Jamieson, Ltd. After using the mixture for the purpose of laying a foundation for his home, plaintiff suffered severe burns. The court stated:

> "Assuming that there was an implied warranty of fitness for the purpose of laying a basement floor including a secondary warranty that the cement was reasonably safe to handle, did the evidence disclose a breach of warranty?

"No.

* * * * *

"No evidence was introduced to show that this cement contained any unusual substance or differed from ordinary cement in any way."

It is evident from the *Simmons* case (supra) that the fact that the cement burned the plaintiff's hands was not sufficient evidence of any breach of warranty of that cement. The holding in the *Simmons* case, namely that merely proving that injury resulted from use of an allegedly defective article is not sufficient to establish a breach of warranty, is equally applicable to the case presently before the court.

It is a matter of common knowledge that clothes will burn and therefore it cannot possibly be said that appellee warranted that the shirt would not burn, if ignited. A seller does not warrant that goods can be used with absolute safety or that they are perfectly adapted to the intended use. This is evident from the court's statement in *Landers v. Safeway Stores, Inc.* (supra):

"* * * Such a warranty does not constitute an agreement that the goods can be used with absolute safety or are perfectly adapted to the intended use, but only that they shall be reasonably fit therefor * * * Nor can one recover for breach of implied warranty of fitness if he suffers harm by reason of the

improper use of the article warranted. See Fredendall v. Abraham and Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11."

Furthermore, clothing is purchased to wear and not to burn, and when it is carelessly ignited by a lighted cigarette or an open flame, as a matter of law, the article of clothing is not being used for the purpose intended.

Appellant relies strongly upon the case of *Deffebach v. Lansburgh*, 150 F.2d 591 (D.C. Cir. 1945). This case, however, is distinguished from the case presently before the court in that in addition to merely showing that the robe worn by the plaintiff caught fire, a textile expert, who had experimented with a sample of the same material from which the robe was made, testified that it had a very low resistance to flaming and that only a fraction of a second was required for ignition purposes. No such testimony appears in the case presently before the court.

Appellant also relies upon the case of *Frank R. Jelleff, Inc. v. Braden*, 233 F.2d 671 (D.C. Cir. 1956). This case is also distinguishable. In speaking of the allegedly defective garment, the court stated:

"* * * The garment here in question was multicolored, with an overlay of gold, probably a bronze metallic pigment. The pigment when heated could

> have the effect of drying the fabric by dispersing heat and taking it up faster than the textile part of the material, thus achieving a more widespread dryness than otherwise might be found* * *"

In the *Jelleff* case there were also admissions of the experts as to the igniting and burning rate of cloth. In the case presently before the court, however, there was no such evidence as to the inflammability of the material from which the allegedly defective shirt was made.

In *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 239 P.2d 848 (1952), the only question on appeal was whether or not plaintiff's amended complaint stated a cause of action. The question of the sufficiency of the evidence presented by the plaintiff was not before the court.

Appellant also cites *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 11 N.E.2d 421 (1953). In this case the only question before the New York Court of Appeals involved the applicable statute of limitations when an action is brought on a theory of breach of warranty.

Appellant also cites the case of *Lohse v. Coffey*, 32 A.2d 258 (D.C. Mun. Ct. App. 1943). This case is clearly distinguishable: *first*, on the ground that it involved an action for breach of warranty in the sale of food for

human consumption; *secondly*, in addition to merely proving that the food caused injury to the plaintiff, there was additional evidence that the food consumed by plaintiff was not fit for human consumption.

> "* * * but did he prove the first element in the case —that the food was tainted? The fact that Monarch, who ate the same salads, also became ill, was evidence of such taint. His physician's testimony that if the food was tainted it 'was a competent producing cause' of the trouble, and was also clearly acceptable proof. The two taken together supply a firm footing for the verdict * * *"

In *Barrett et ux v. S. S. Kresge Co.*, 31 Pa. D. & C. 379 (1938), cited by the appellant, the court held that there was sufficient *evidence of a deleterious substance* present in the dress to carry the case to the jury. In addition, however, to showing that the dress caused the injury to the plaintiff, there was expert testimony that the garment must have contained a poison to produce the injurious effect upon the plaintiff.

In view of the foregoing discussion, it is submitted that appellant failed to present any substantial evidence that the shirt in question was not reasonably fit for the purpose intended.

POINT II

The trial court could have properly directed a verdict in favor of the appellee on the ground that privity was lacking between the appellant and the appellee.

Appellant could not maintain an action against the appellee for breach of warranty unless there were privity of contract between them.

The general rule adhered to by the overwhelming majority of jurisdictions is that in order to recover in an action for breach of warranty there must be privity of contract between the warrantor and the person seeking recovery. 77 C.J.S. Sales, § 305 (b). It is clear from the record that the appellant did not purchase the allegedly defective shirt (Tr. 20, 23, 39) and consequently there was no privity between the appellee and the appellant. Furthermore, the appellant did not authorize his wife to purchase the allegedly defective shirt (Tr. 59, 73).

Even in family situations there must be privity of contract between the plaintiff and the defendant, if the plaintiff desires to recover on the theory of breach of warranty. In *Barni v. Kutner*, 45 Del. 550, 76 A.2d 801 (1950), the wife brought an action for damages received as a result of an automobile collision. The husband sought damages for loss of services and consortium of his wife, as well as medical expenses incurred for his

wife's injuries and damages to the car. The actions of the husband and wife were brought against the dealer of the automobile who sold said automobile to the husband. The alleged breach of warranty was that the brakes were defective. In holding that the wife could not recover against the dealer because she was not in privity with him, the court made the following statement:

> "* * * The majority rule requires privity of contract to recover for breach of warranty. 46 Am. Jur. 487; Chanin v. Chevrolet Motor Co., 7th Cir., 89 F.2d 889; Pearl v. Wm. Filene's Sons Co., 317 Mass. 529, 58 N.E.2nd 825. In my opinion, the majority view is more logical. A warranty is an integral part of a contract. It is primarily made for the benefit and protection of the promisee; its validity depends upon consideration. . . . Rights of third parties in cases like the present one arise entirely independently of the contract and may be enforced in an appropriate tort action; no powerful practical reason requires us to abandon or modify the basic principles of contract law in order to guarantee an adequate remedy * * *"

In *Pearl v. William Filene's Sons Co.*, 317 Mass. 529, 58 N.E.2d 825 (1945), the wife purchased a wave set for herself and was injured in the application thereof. The husband brought an action for loss of consortium, and the court made the following statement:

> "The plaintiff (husband) could not recover * * * for breach of warranty arising from the sale of the set to his wife. She and not he was the buyer. There

was no contractual relation between the defendant and him with respect to the sale of the set, and in this respect he stood as a stranger to the defendant * * *" (citing authorities)

In accord is *Great Atlantic & Pacific Tea Co. v. Walker*, 104 S.W.2d 627 (Tex. Civ. App. 1937), revs'd on oth. grds. 112 S.W.2d 170, wherein the court made the following pertinent observation:

"* * * Since a warranty is a part of a contract, only the parties to the contract, as a general rule, can assert rights which exist only by virtue thereof. We again quote from Corpus Juris: 'Recovery on a warranty has been withheld from one whose connection with the goods is that of wife of the purchaser; and from a dependent child of the purchaser, even though the purchaser at the time of the sale expressly specified that the property was to be used for such child, * * *' "

In *Tally v. Beever & Hinds*, 33 Tex. Civ. App. 675, 78 S.W. 23 (1903), the defendants manufactured and sold to the plaintiff's father a gasoline pear burner. Plaintiff was injured by the top of a gas cylinder which blew off while plaintiff was filling the cylinder in accordance with the directions. The court held that only the father could recover on the theory of breach of warranty.

In *Duncan v. Juman*, 25 N.J. Super, 330, 96 A.2d 415 (1952), the parents of Joseph Duncan purchased

buns for family consumption at a neighborhood delicatessen. The son while eating a bun was injured on a wire lodged therein. A judgment in favor of the infant plaintiff was reversed because there was no evidence of negligence and because he could not recover on the theory of breach of warranty since he was not in privity with the defendant.

In *Hermanson v. Hermanson*, 19 Conn. Sup., 479, 117 A.2d 840 (1954), the father sought to recover for medical expenses incurred on behalf of his daughter, who was injured in an automobile accident. The action was brought against the dealer who sold the automobile to the wife. It was alleged that the injuries were sustained because the windshield lacked certain safety features warranted by the dealer. The court said:

> "It is settled law that for breach of express warranty there can be no recovery except by the person with whom the seller made the contract of which the warranty is a part * * * Neither the minor plaintiff nor her father were parties to the mother's contract of purchase of the car * * *"

In *Connor v. Great Atlantic & Pacific Tea Co.*, 25 F. Supp. 855 (W.D. Mo. 1939), the court held that an implied warranty of wholesomeness of food does not extend to the wife or other members of the family of the husband purchaser.

In *Welsh v. Ledyard*, 167 Ohio St. 57, 146 N.E.2d 299 (1957), the plaintiff's husband purchased an electric cooker from the defendant for use by the plaintiff. The cooker exploded and injured the plaintiff. Plaintiff brought an action on the theory of breach of warranty against the seller, but the court held that there was no such privity between the retailer and the plaintiff as would permit her to recover upon the theory of implied warranty.

In *Abraham v. M. S. Berkoff Co.*, 2 App. Div. 2d 686, 152 N.Y.S.2d 591 (1956), an action was brought by an infant for injuries sustained when a shower handle broke. The infant's father had purchased the shower handle from the defendant. The infant's action based on breach of warranty was dismissed, and the dismissal was affirmed by the appellate court.

The cases cited by the appellant on pages 11 and 12 of his brief to support the proposition that privity is not required in order for one to recover on the theory of breach of warranty are clearly distinguishable from the case presently before the court in that such cases involve *sales of food for human consumption.*

It is conceded that in a few cases involving sales of food for human consumption, the privity requirements have been abandoned or relaxed. This abandonment or relaxation of the privity requirement, however, has

only taken place where there have been sales of food for human consumption. Consequently, the cases cited by the appellant can have no application to the case presently before the court.

POINT III

The trial court could have properly directed a verdict in favor of the appellee on the ground that appellant gave no notice to the appellee that he intended to assert a claim for damages for breach of warranty as required by ORS 75.490.

A. The requirement of notice is applicable to the facts and circumstances of this case.

B. The appellant gave no notice that he intended to assert a claim for an alleged breach of warranty against the appellee.

Filing of the complaint is not a proper method by which notice may be given.

C. Assuming that commencement of an action is a proper method by which notice may be given, the commencement of the action in this case was not notice given within a reasonable time after the appellant knew or should have known of the breach.

D. Notice given by the appellant by his complaint was misleading and therefore insufficient.

E. Even assuming that the purpose of the notice requirement is merely to encourage the purchaser to inform the seller of facts which would enable the seller to act, appellant had much helpful information which he could have passed on to the appellee.

The true purpose, however, of the notice requirement is to inform the seller that the buyer intends to assert a claim for damages for breach of warranty against him.

A. Oregon has adopted the Uniform Sales Act in Oregon Revised Statutes, Chapter 75. ORS 75.490 provides:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. *But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.*" (Emphasis supplied)

In answer to appellant's contention that the notice requirement set forth in ORS 75.490 (supra) does not apply to the facts in the case presently before the court, it should be noted that ORS 75.490 and, in fact, the entire Uniform Sales Act, apply to the sale of all types of

goods. No exceptions are specified in any of the provisions of the Sales Act.

In *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 239 P.2d 848 (1952), a case strongly relied on by appellant, Mrs. Ringstad was injured when a summer cocktail robe purchased from defendant allegedly instantaneously burst into a sheet of flame when the robe came into casual contact with the burner of an electric stove while plaintiff's wife was preparing food in the kitchen. In referring to the notice requirement, the court made the following statement:

> "* * * Neither the original nor the amended complaint stated a cause of action in negligence, and without an allegation of the notice required by Rem. Rev. Stat. § 5836-49, the original complaint stated no cause of action for breach of warranty * * *"

The Washington statute referred to in the above quotation is identical to O.R.S. 75.490 and certainly, if notice were required in the *Ringstad* case, the notice requirement would be equally applicable in the case presently before the court.

The notice requirement was specifically imposed in the following analagous cases:

Bruns v. Jordan Marsh Co., 305 Mass. 437, 26 N.E.2d 368 (1940). (Plaintiff was injured when she fell down-

stairs by reason of the heel becoming detached from the left shoe of a pair which she had purchased from defendant.)

Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945). (Plaintiff husband sued for personal injuries sustained by his wife in using a permanent wave set sold by defendants to the wife.)

Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934). (Plaintiff was injured as a result of using a hair removing cream purchased at defendant's store.)

Murphy v. Gilchrist Co., 310 Mass. 635, 39 N.E.2d 427 (1942). (Pajamas purchased from defendant caused a rash on plaintiff's body.)

Harburger v. Stern Bros., 189 N.Y. Supp. 74 (Sup. Ct. 1921). (Plaintiff alleged that trousers purchased from defendant were full of holes shortly after they were purchased and that the cloth tore because of improper weaving.)

Silvera v. Broadway Dept. Store, Inc., 35 F. Supp. 625 (S.D. Cal. 1940). (Plaintiff sued for injuries allegedly resulting to plaintiff's forehead by reason of contact with a hatband purchased from defendant.)

Appellant cites *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1923), in support of

his contention that the notice requirement is not applicable to the case presently before the court. The *Kennedy* case is clearly distinguishable since that case involved the *sale of food for human consumption* and in such cases a minority of courts have relaxed the notice requirement. Even in cases involving the sale of food, however, the great majority of courts still hold that the notice requirement of the Uniform Sales Act applies. The notice requirement was specifically imposed in the following cases involving the sale of food: *Schuler v. Union News Co.*, 295 Mass. 350, 4 N.E.2d 465 (1936); *Hazelton v. First National Stores, Inc.*, 88 N.H. 409, 190 Atl. 280 (1937); *Vogel v. Thrifty Drug Co.*, 43 Cal.2d 184, 272 P.2d 1 (1954); *Whitfield v. Jessup*, 31 Cal.2d 826, 193 P.2d 1 (1948); *Baum v. Murray*, 23 Wash.2d 890, 162 P.2d 801 (1945).

The cases cited by the appellant for the proposition that the notice requirement has no application to the facts of the case presently before the court have been *severely* criticized.

The court, in *Hazelton v. First National Stores, Inc.* (supra), in speaking of *Kennedy v. F. W. Woolworth Company* (supra), made the following observations:

> "The plaintiff attempts to defend the action of the trial court upon the ground that the statute 'was never intended to apply to the sale of goods for immediate human consumption,' and in support of

this position relies upon the case of Kennedy v. F. W. Woolworth Company, 205 App. Div. 648, 200 N.Y.S. 121. The language of the New York court seems to sustain the plaintiff's position, but the decision was based upon the ground that the action was in substance one of tort in the nature of deceit rather than of contract. The interpretation which the court placed upon section 49 of the Sales Act was therefore unnecessary and appears to us to be inconsistent with the general plan of the statute and the purpose of the section in question.

" 'The English statute makes no special provision for warranty in sales of food. The American Sales Act follows it in this respect. * * * The matter has thus been stated by the New York Court of Appeals: "We have no doubt that section 96 (of the New York Personal Property Law [Consol. Laws. c. 41]; section 15 of the Sales Act) expressed as it is in general terms, applies to all sales including sales of food and that any rules hitherto applied inconsistent with this section are abolished." ' 1 Williston, Sales (2d Ed.) § 242a, citing Rinaldi v. Mohican Company, 225 N.Y. 70, 121 N.E. 471. Since the general provisions of the Sales Act in regard to warranties apply to sales of food and lie at the foundation of the plaintiff's case, it is difficult to understand upon what theory it can be held that the subsequent provisions of the act limiting the right of recovery for a breach of one of the warranties previously imposed are not applicable to cases arising out of sales of food.

* * * * *

"The purposes of the notice required by the Sales Act are, we think, similar to those enumerated above, and the requirement that prompt notice shall be given is equally imperative; 'the statute makes it an absolute condition' of liability for breach of warranty thereunder. 2 Williston, Sales, supra. No reason has been suggested, and none occurs to us, why

a seller of food for immediate human consumption needs protection from 'belated claims for damages' any less than a seller of food for less immediate use such as dried mushrooms, Ferguson v. Netter 204 N.Y. 505, 98 N.E. 16, or beans, Niehoff-Schultze Grocer Co. v. Gross, 205 App. Div. 67, 199 N.Y.S. 196, or than a seller of clothing, Silverstein v. Blum, 167 App. Div. 660, 153 N.Y.S. 34, or steel, American Mfg. Co. v. U.S. Shipping Board Emergency Fleet Corporation (C.C.A.) 7 F(2d) 565, or yarn, Lincoln v. Croll, 248 Mass. 232, 142 N.E. 820. We accordingly hold that the plaintiff's claim is subject to the requirements of section 49 of the Sales Act."

Both *Kennedy v. F. W. Woolworth Company* (supra) and *Silverstein v. R. H. Macy & Co.*, 266 App. Div. 5, 40 N.Y.S. 2d 916 (1943), are *severely* criticized in *Whitfield v. Jessup* (supra):

"It is argued, however, that the notice required does not apply to goods sold for immediate human consumption as distinguished from the sale of other chattels, and reliance is placed upon Kennedy v. F. W. Woolworth Company, 205 App. Div. 648, 200 N.Y.S. 121. (See, also, Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916, refusing to apply it where the sale was of an article [gymnasium equipment] for immediate use.) The sales act on its face clearly applies to the sale of food or other articles for immediate human use or consumption. The reference throughout the statutory provisions on the law of sales is to the sale of 'goods'. In determining that there is an implied warranty that the food is fit for human consumption under the statutes dealing with the law of the sales of goods, it is accepted that the sale of food for immediate human consumption is a sale of goods under the statute. (citing authori-

ties). In Kennedy v. F. W. Woolworth Company, supra, the court reasoned, in face of the clear language of the statute requiring notice, that the reason for the requirement of notice is not relevant to such a case * * * There is no intimation in the statute that it is confined to cases where an inspection would show a defect of quality. It is clear that in cases where the article is sold for immediate human consumption the defect will eventually be discovered. Otherwise there would be no controversy over a breach of warranty. When the discovery should be made and what constitutes a reasonable time in cases of this class may well be somewhat different from cases where the article is not for immediate consumption, because of the opportunity for inspection, yet that does not mean the statute should have no application. Provision is made that the point from which the reasonable time runs is when the buyer knows or should have known of the breach. Thus the rule is not unduly hard upon him, and in cases where the defect is not readily discoverable, or an inspection is not feasible (such as in the case at bar where the food is for immediate consumption and the defect — the cause of undulant fever — is latent), we have factors bearing significantly upon when discovery of the breach should be made and what constitutes a reasonable time. The intimation in the Kennedy case, supra, is that the statute should not apply because the action sounds in tort. That may be true of all cases of warranty which pose the much debated question of whether an action on a warranty is in tort or contract. The fact remains that the statute deals with a warranty such as we have here whether an action thereon be said to sound in tort or contract.

"The courts in other jurisdictions have constantly refused to follow the Kennedy case and have held that the statute involved applies to warranties in the sale of goods for immediate consumption including food." (Citing authorities)

Further criticism of *Kennedy v. F. W. Woolworth Co.* (supra) is found in *Schuler v. Union News Co.* (supra) and *Baum v. Murray* (supra).

At this juncture, it should be pointed out that appellant cites *Maxwell v. Southern Oregon Gas Corporation*, 158 Or. 168, 74 P.2d 594 (1938), as being in accord with *Kennedy v. F. W. Woolworth Co.* (supra) and *Silverstein v. R. H. Macy & Co.* (supra). The *Maxwell* case, however, merely holds that the requirement of notice, as set forth in the Uniform Sales Act, does not apply to a breach of warranty of title.

B. It is perfectly clear from the record that appellant gave no notice of the alleged breach of warranty to the appellee. The first notice which the appellee had of the alleged breach of warranty was the complaint filed by the appellant on May 22, 1957, approximately two years after the date on which the appellant became aware of the alleged breach.

Appellant cites the case of *Silverstein v. R. H. Macy & Co.* (supra) for the proposition that the commencement of the action itself affords sufficient notice of a breach of warranty under the Sales Act. *First*, it should be pointed out that the statement of the court in regard to the sufficiency of the notice was pure dictum in that the court held that the notice requirement was not necessary under the circumstances of the case; *secondly*, it

should be pointed out that the case relied on by the court in *Silverstein v. R. H. Macy & Co.* (supra), in making such statement, had nothing to do with notice of breach of warranty as required by the Sales Act. The case relied on by the New York court was *Henderson Tire & Rubber Co. v. P. K. Wilson & Son*, 235 N.Y. 489, 139 N.E. 583 (1923). In that case, defendants contracted to buy tires to be manufactured by the plaintiff. Defendants refused to accept the tires tendered by the plaintiff seller and notified the seller that they would not accept further delivery or give further specifications for manufacture. Plaintiff sued for breach of contract, and the court, in discussing whether plaintiff was required to give notice before commencing his action, made the following statement:

> "There was no necessity for the plaintiff to give notice under section 146 of the Personal Property Law. But, if it be assumed that such notice were required, it gave all the notice that was necessary when it commenced this action within *a very short time* after the defendants had taken the position that they would not perform. The law does not require something to be done for the mere form of it, since it looks to substance. If a notice were to be given, it was for a purpose. No purpose could here have been served because defendants had announced they would give no further specifications and accept no further deliveries. Under such circumstances, what could possibly have been accomplished by giving a notice assuming that one were required? Strasbourger v. Leerburger, 233 N.Y. 55, 134 N.E. 834. When a no-

> tice is required to be given, it is for the purpose of enabling the person to whom given to act. When the person has already taken a position which precludes action, a notice is never required * * *" (Emphasis supplied)

The *Henderson* case is clearly distinguishable from the case presently before the court in that the notice question was not discussed in relation to an action for breach of warranty and in that the action was started a very short time after the defendants had taken the position that they would not perform.

Furthermore, it should be pointed out that the court in *Silverstein v. R. H. Macy & Co.* (supra), in stating that commencement of the action itself affords sufficient notice of a breach of warranty, was apparently completely unaware of the purpose of the notice requirement. The true purpose of the notice requirement is to advise the seller that he must meet a claim for damages, and the law requires that the seller have early warning of this claim. Certainly, it cannot be said that the institution of an action two years after appellant became aware of the alleged breach of warranty was early warning of the appellant's claim. The purpose of the notice requirement is well stated by Judge Learned Hand in *American Mfg. Co. v. United States Shipping Board E. F. Corp.*, 7 F.2d 565 (2d Cir. 1925):

"The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning."

Judge Learned Hand's language in *American Mfg. Co. v. United States Shipping Board E. F. Corp.* (supra) has been quoted and followed by an unbroken line of authorities ever since the decision in that case was rendered. See *Columbia Axle Co. v. American Automobile Ins. Co.*, 63 F.2d 206 (6th Cir. 1933); *Texas Motor Coaches, Inc. v. A. C. F. Motors Co.*, 154 F.2d 91 (3d Cir. 1946); *Whitfield v. Jessup* (supra); *United States v. Whitin Mach. Works*, 79 F. Supp. 351 (D. Mass. 1948); *Reininger et al v. Eldon Mfg. Co.*, 114 Cal. App.2d 240, 250 P.2d 4 (1952); *Ringstad v. I. Magnin & Co.*, (supra); *Howard-Cooper Corp. v. Umpqua Co.*, 148 Or. 582, 36 P.2d 590 (1934).

In *Howard-Cooper Corp. v. Umpqua Co.* (supra), the court stated:

"The purpose of the statutory provision requiring such notice is clearly to give the seller timely information that the buyer proposes to look to him for

damages for the breach; that the former may govern his conduct accordingly * * *" (Citing authorities)

Even the New York court in *Maggioros v. Edson Bros.*, 164 N.Y. Supp. 377 (Sup.Ct. 1917) stated:

"This provision is intended for the protection of the seller. The design of it is to give the seller an early notice of the alleged defects * * * The purpose of the statute was to give the seller notice, *before suit, and not by suit.*" (Emphasis supplied)

C. Even assuming that the commencement of the action is a proper method by which notice may be given, the commencement of the action in the case presently before the court occurred so long after the alleged breach of warranty became known to the appellant that such notice was insufficient as a matter of law.

It is apparent from the record that at any time after the appellant became aware of the alleged breach of warranty he could have easily notified the appellee that he intended to assert a claim for the alleged breach. It is evident from paragraphs I and II of appellant's amended complaint (Tr. of Record 3, 4) that the allegedly defective shirt was purchased at appellee's store in Portland, Oregon. At the time appellant was injured he was residing in Portland, Oregon, and at the time of trial

he was residing in Vancouver, Washington (Tr. 3), which adjoins the city of Portland. Appellant was employed in Vancouver, Washington, at the time he sustained his injuries and also after he recovered therefrom (Tr. 4, 20). Appellant was released from the hospital within three weeks after the date on which his injuries were sustained (Tr. 13) and had resumed gainful employment within eight weeks after such date (Tr. 24). It will also be noticed that after the date on which appellant sustained his injuries the appellant's wife was still working for the appellee at the store where the allegedly defective shirt was purchased (Tr. 38, 60-62), and that she worked in close proximity to the department in which the shirt was purchased (Tr. 40). Furthermore, after she left the appellee's employ, she was employed in a store in Vancouver, Washington (Tr. 42, 43). It should be added that there is no evidence that appellant was unable to give prompt notice, nor evidence from which it could be inferred that he was excused from giving such notice.

A case exactly in point is *Murphy v. Gilchrist Co.* (supra). Here plaintiff brought an action for breach of an implied warranty of fitness of two pairs of pajamas purchased by plaintiff from the defendant. The pajamas caused a rash on plaintiff's body. In holding that the notice given by plaintiff to defendant was not given with-

in a reasonable time, the court made the following observations:

> "In our opinion this evidence would not warrant a finding that the plaintiff gave notice within a reasonable time after he knew or ought to have known of the breach. He waited forty days after the beginning of the rash, which even then he 'associated' with the pajamas, thirty-four days after he called a physician, and twenty-seven days after the physician expressed the opinion that the rash was a local condition and not a blood condition. It does not appear that the plaintiff acquired any additional knowledge after that. During nearly all of this time the plaintiff was working, and there is nothing to show that he was unable to give notice more promptly or that he had any excuse for not doing so. What is a reasonable time must be determined in view of the circumstances of each particular case and will vary widely in different types of cases. But in a case of this kind where the buyer has the necessary knowledge and shows no reason for delay the seller may be deprived of the protection which the statute was designed to afford him unless the notice is given more promptly than was done in this case."

Another case directly in point is *Hazelton v. First National Stores, Inc.* (supra). Here an action for breach of implied warranty was brought for damages caused by eating trichinae infested pork sold by the defendant and a delay of six months in giving notice was considered unreasonable:

> "At the time when the defendant's motions for nonsuits were made, there was no evidence in the

case that any claim for breach of warranty had been presented to the defendant until the suits in question were instituted, more than a year after the plaintiffs were taken sick. At the hearing in this court, however, it was stated by the plaintiffs' counsel, and conceded by the defendant, that such a claim was presented by a letter addressed to the main office of the defendant corporation in Cambridge, Mass., by attorneys in Boston, upon October 17, 1933, which was approximately six months after the illness of the plaintiffs began.

* * * * *

"The statutory requirement of notice within a 'reasonable time' has been construed as a 'positive requirement of prompt notice.' 2 Williston, Sales, supra. 'Prompt notice' can mean nothing less than notice without unnecessary delay. A delay of six months in giving notice to the defendant of a claim for breach of warranty, therefore, required explanation as a part of the plaintiffs' case. No such explanation was given.

* * * * *

"* * * It is certain that no notice was given for six months and no 'business or legal excuse' for the delay is suggested. Under these circumstances it cannot be found that the statutory requirement of prompt notice was fulfilled, and it follows that the plaintiffs' action cannot be maintained * * *"

Another case squarely in point is *Silvera v. Broadway Dept. Store, Inc.* (supra). This was an action for injuries allegedly resulting to plaintiff's forehead by reason of contact with a hatband purchased from defendant. The court stated:

"* * * Seven and one-half months after the purchase and approximately seven months after the appearance of discoloration, is not timely notice * * *"

In *Davidson v. Herring-Hall-Marvin Safe Co.*, 131 Cal. App.2d 874, 280 P.2d 549 (1954), the buyer of a safe discovered that defective manufacture of the safe was responsible for moisture damage to a stamp collection stored therein, but did not notify the seller of the defect or of the damage to the stamps until more than fifteen months later. The court held that the delay in giving notice was unreasonable and that the buyer could not hold the seller liable for breach of warranty. After discussing *Whitfield v. Jessup* (supra), the court went on to say:

"The fair inference from this language is that in the case of sales of goods other than foodstuffs 'containing latent defects,' the court would regard a delay in giving notice of six months from the date plaintiff had knowledge of the breach as unreasonable as a matter of law. And such appears to be the fairly uniform holding of the courts which had occasion to consider the question under statutes identical with our own which is a counterpart of section 49 of the Uniform Sales Act * * *" (Citing authorities)

Even the New York cases require prompt notice of the alleged breach of warranty when plaintiff is suing

for a breach of warranty of clothing sold by defendant. A delay of twenty-three days in one case and fifty-six days in another in giving notice of defects in the quality of clothing were held to be unreasonable in *Silverstein v. Blum*, 167 App. Div. 660, 153 N.Y. Supp. 34 (1915), and *Matthes v. Benn*, 191 App. Div. 557, 181 N.Y. Supp. 670 (1920). A delay of twenty-three days in reporting defects in sandals was held to be unreasonable in *Kaufman v. Levy*, 102 Misc. 689, 169 N.Y. Supp. 454 (1918), and a delay of thirty-nine days was held to be unreasonable with reference to alleged defects in shoes in *Silberman v. Engel*, 125 Misc. 816, 211 N.Y. Supp. 584 (1924). In *Harburger v. Stern Bros.* (supra) the court held that a period of approximately seven months before notice was given to the alleged defect in trousers was unreasonable as a matter of law.

D. The notice required by the Uniform Sales Act should be clear and unambiguous. *Texas Motor Coaches, Inc. v. A.C.F. Motors Co.* (supra), *Wright v. General Carbonic Co.*, 271 Pa. 332, 114 Atl. 517 (1921). It has also been held that such notice must be unequivocal. *Murphy Laboratories, Inc. v. Emery Industries, Inc.*, 95 F. Supp. 561 (E.D. Pa. 1951). If it could be said, by any stretch of the imagination, that the notice afforded appellee by the appellant was timely, it certainly was not clear and unequivocal. In paragraph I of appellant's contentions

contained in the pretrial order (Tr. of Record 7), appellant asserts that he purchased a shirt bearing the name "Pilgrim" and paid appellee $2.98 therefor. Similar contentions appear in paragraph II of appellant's amended complaint (Tr. of Record 3). At the time of trial, however, appellant and appellant's wife stated that the allegedly defective shirt was not a "Pilgrim" shirt and that the price paid therefor was not $2.98 (Tr. 5, 40, 41, 46, 64-70). It is evident from the transcript that appellant has shown that the allegedly defective shirt was not a "Pilgrim" shirt for which appellant paid $2.98 as alleged in his amended complaint and in the pretrial order. Consequently, the amended complaint could not possibly be construed as adequate notice since appellant completely misinformed appellee as to what allegedly defective article of merchandise was involved.

E. At page 17 of his brief, appellant contends that he had no information which he could have given to the appellee by notice that would have enabled the latter to act. Even assuming that the purpose of the notice requirement is merely to encourage the purchaser to inform the seller of facts which would enable the seller to act, appellant's contention is patently incorrect.

The information which the appellant could have given the appellee would certainly have assisted the appellee in identifying the lot from which the allegedly defec-

tive shirt had come. Appellant knew the color of the shirt (Tr. 4, 5); that the shirt had short sleeves with three buttons at the collar (Tr. 5); that the shirt was made from polished chambray cloth (Tr. 5, 6, 41); that the shirt had navy blue trimming and that it was a gaucho type shirt (Tr. 39); that the shirt was purchased in May (Tr. 39); that the purchase price of the shirt was less than $2.98 (Tr. 41), but at least more than $2.59 (Tr. 45, 46); that the shirt was purchased on a special sale (Tr. 41); that the shirt was made of light weight cotton cloth (Tr. 46).

If appellant had given appellee all the information specified above, certainly the appellee could have pinpointed the lot from which the allegedly defective shirt had come. Upon determining the lot, similar shirts could have been tested by the appellee for inflammable characteristics. Even assuming that it would have been difficult to determine from what lot the allegedly defective shirt had come, surely the appellee should have the opportunity to attempt to discover the type of shirt involved and to test it. Furthermore, any difficulty in tracing the shirt would only be increased by failure of the appellant to give prompt notice to the appellee. Timely notice of the alleged breach of warranty would also have given the appellee an opportunity to make demand upon the manufacturer of the shirt, to tender the defense of

this action to such manufacturer, and to enable the latter to prepare for trial.

Even assuming that the appellant had no information which could have been helpful to the appellee, it was still incumbent upon the appellant to inform the appellee that he intended to assert a claim against it. The appellant has misconstrued the purpose behind the notice requirement. The purpose of the notice requirement is to inform the seller that the buyer is claiming a breach of warranty. The statement by Judge Learned Hand in *American Mfg. Co. v. United States Shipping Board E. F. Corp.* (supra) makes this point with crystal clearness:

> "The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. *The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach.* The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." (Emphasis supplied)

The fact that the allegedly defective shirt was not in existence is completely immaterial to the requirement of notice. This is evident from a statement of the court in *Whitfield v. Jessup* (supra):

"* * * '*While it may be one purpose of the notice required by the statute to permit the seller to make inspection of the goods, whether in the hands of the vendee or not, it is certainly not its only purpose.* "The purpose of the notice," said Judge Learned Hand, "is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." ' * * *" (Emphasis supplied)

At page 17 of his brief, appellant states:

"If a notice were to be given, it was for the purpose of enabling the person to whom it was given to act."

If it could possibly be said that appellant's conception of the purpose of the notice requirement was correct, the case of *Henderson Tire & Rubber Co. v. P. K. Wilson & Son* (supra) relied on to support the statement from appellant's brief quoted above is completely distinguishable. The discussion and quotation from that case (supra) clearly shows that the *Henderson* case did not involve a breach of warranty situation. It also will be noted in the quoted portion from that case that the court stated that no purpose could have been served by giving notice because the defendants had announced that they would give no further specifications and accept no further deliveries. In other words, the defendants informed

plaintiff in advance that they would not perform their part of the contract. In the case presently before the court, however, appellee gave the appellant no reason to believe that the appellee would not make an attempt to locate the lot from which the allegedly defective shirt had come, and thereafter make a test of identical shirts to determine the inflammability thereof. Certainly it was not the province of appellant to decide whether or not an identical shirt to the one allegedly defective could be found. The court in the *Henderson* case stated:

> "* * * When the person has already taken a position which precludes action, a notice is never required * * *"

It is perfectly obvious that the above statement from the *Henderson* case is not applicable to the appellee in the case presently before the court.

Based on the foregoing discussion the appellee submits that notice of the alleged breach of warranty was required under the facts of the case presently before the court and that no reasonable or sufficient notice was given.

POINT IV

A. Pleading and proving that reasonable notice was given in an action for breach of warranty is a condition precedent to recovery and is a burden resting on the ap-

pellant. It is not a matter of defense which must be raised by the appellee and therefore the appellee cannot be said to have waived the notice requirement by failing to raise the notice question in the pretrial order.

B. The Oregon statutory requirement of reasonable notice is a matter of substantive law which the federal court must apply in this case.

It is apparent from ORS 75.490 (supra) that the giving of reasonable notice is a condition precedent to recovery in an action for a breach of warranty. If notice of the breach is not given within a reasonable time after the buyer knows, or ought to know of the breach, "the seller shall not be liable therefor." (ORS 75.490)

The burden of pleading and proving that reasonable notice was given is placed upon the party claiming the breach of warranty. This is clearly evident from the language of the court in *Maxwell v. Southern Oregon Gas Corporation*, 158 Or. 168, 74 P.2d 594 (1938). In that case, the court stated:

> "* * * The clear and practically unbroken current of authority establishes the doctrine that the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach: * * *" (citing authorities)

* * * * *

> "We, therefore, find it necessary to overrule the case of *Boone v. Lockhart*, supra, insofar as it holds that failure to give notice of breach of warranty under this statute is a matter of defense to be pleaded and proved by the vendor."

In view of the *Maxwell* case (supra), it is clear that it was incumbent upon the appellant to contend and prove that sufficient and timely notice was given in the case presently before the court. The burden certainly was not upon the appellee to contend in the pretrial order that notice was not given. It is conceded that one of the purposes of pretrial procedure is to narrow the issues in each case, but it cannot be contended that pretrial procedure would relieve the appellant from contending and proving a prima facie case on which he is entitled to recover. Pretrial procedure does not shift such a burden from a plaintiff onto a defendant. Since there was no stipulation in the pretrial order that sufficient or timely notice had been given, it was necessary for the appellant to contend and to establish that the notice requirement had been satisfied.

B. It is apparent from the stipulation of facts in the pretrial order that the jurisdiction of the United States District Court for the District of Oregon was based on diversity of citizenship (Tr. of Record 7). Ever since the leading case of *Erie Railroad v. Tompkins*, 304 U.S. 64,

58 S.Ct. 817, 82 L.Ed. 1188 (1938), Federal District Courts, sitting in diversity cases, have been required to apply the substantive law of the states within which they sit. If it would significantly affect the result of a litigation for a federal court to disregard the law of a state that would be controlling in an action upon the same claim by the same parties in a state court, that state law would be considered a matter of substance which a federal court, sitting in a diversity case, would have to follow. The leading case of *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1944) clearly so holds:

> "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?
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> * * * * *
>
> "* * * Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology * * * In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same,

so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

* * * * *

"Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

* * * * *

"* * * Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."

In accord are *Angel v. Bullington,* 320 U. S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947); *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U. S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); *Woods v. Interstate Realty Co.,* 337 U. S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949).

It is clear that the requirement of pleading and proving that sufficient and timely notice was given to

the appellee is a matter of substantive law. It is obvious that it would significantly affect the result of this case if the Oregon statutory requirement of notice were not applied.

The Oregon court in *Tripp v. Renhard*, 184 Or. 622, 200 P.2d 644 (1948), in referring to § 71-149, O. C. L. A. (now ORS 75.490), made the following observations:

> "It will be noticed that the provision exacts of a buyer, who is not favored by a stipulation to the contrary, a duty which he must perform if he wishes to hold the seller liable for a breach of warranty. The duty is the following: 'give notice to the seller of the breach of any promise or warranty.' The provision states clearly the time when the duty must be performed. The time schedule is: (1) 'after acceptance,' and (2) 'within a reasonable time after the buyer knows, or ought to know, of such breach.' By reverting again to the provision, it will be observed that its sweeping language is all inclusive. It is not applicable only in some forms of action, nor is it confined only to some defenses. In fact, it is not concerned with procedure. The object of its concern is something more fundamental than procedure. Procedure is subservient to or the handmaiden of rights. Section 49 is concerned with the recognition and extinction of rights. The provision recognizes no exceptions to the rights with which it deals and the duties which it exacts save only those wherein the parties by 'express or implied agreement' have provided for a different course. It states in simple language the result which the courts must recognize when the buyer fails to give the needed notice. The result, as stated, is: 'the seller shall not be liable therefor.' "

In *Owen v. Schwartz*, 177 F.2d 641 (D.C. Cir. 1949), cited by appellant, plaintiff sought return of a $5,000.00 forfeit money deposit which she had paid to defendant Schwartz, a real estate broker, in connection with an executory contract negotiated by Schwartz as agent for the owners of certain real property. The plaintiff alleged that she was induced to enter this contract by certain fraudulent representations made by defendant Schwartz. In her complaint, plaintiff alleged that defendant Schwartz represented that a $30,000.00 loan *could be secured* on the property. In the pretrial order, however, the issue so formulated as to this loan commitment was that prior to plaintiff's entering the contract, *defendant Schwartz stated that he had a $30,000.00 loan commitment on the property*. The evidence offered by plaintiff at trial was to the effect that defendant Schwartz had stated that he had a $30,000.00 loan commitment on the property in question. Defendant claimed that this was a variance from the allegations of the complaint. The court held, however, that in view of the manner in which the loan commitment issue was formulated in the pretrial order, there was no variance.

Appellant also cites *Washington v. General Motors Acceptance Corp.*, 19 F.R.D. 370 (S.D. Fla. 1956). Here the purchaser of an automobile brought an action against the holder of a conditional sales contract for

wrongful conversion of such automobile. By pretrial order, one of the issues to be tried was whether or not the purchaser had given permission for repossession, and the action was tried on the issue of whether such permission had been given at the time the contract holder retook the automobile. The court held that the holder of the contract could not obtain a new trial on the ground that the purchaser had given such permission by the wording in the conditional sales contract.

In *Fowler v. Crown-Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947), plaintiffs sought to recover damages on account of an alleged maintenance of a nuisance by the defendant. The pretrial order limited the issues for determination by the jury to the depreciation, if any, in the value of plaintiffs' property and to their loss, if any, of income therefrom as a result of the acts of the defendant. In view of the pretrial order, the court, on appeal, stated that plaintiffs were not entitled to damages for discomfort and annoyance or injury to health of themselves, as individuals, over and beyond any loss of income or depreciation in property value.

It will be noted that all of the cases cited by the appellant merely involved *attempts to alter factual issues clearly joined* in the pretrial order. These cases certainly do not hold that it is incumbent upon the *defendant* to assert the necessary facts constituting the

plaintiff's cause of action in the pretrial order, which, in effect, is the burden which the appellant is presently attempting to place upon the appellee in the case now before the court. As indicated above, the burden of pleading and proving timely and sufficient notice of the alleged breach of warranty is clearly placed upon the appellant. The appellee could not possibly be said to have waived the requirement of reasonable notice by failing to raise the notice question in the pretrial order, when the duty of raising such question squarely rests upon the appellant.

CONCLUSION

The trial court was correct in finding that there was no substantial evidence presented that the shirt sold by the appellee was not reasonably fit for the purpose intended. Furthermore, the trial court properly directed a verdict for the appellee because appellant failed to present any substantial evidence that there was privity between the appellee and the appellant; and because appellant failed to satisfy the statutory requirement of giving reasonable notice to the appellee of his intention to assert a claim for breach of warranty.

The giving of reasonable notice is a condition precedent to recovery. The *appellant* must plead and prove that reasonable notice was given, and the right to re-

ceive reasonable notice was not waived by appellee by failing to bring this requirement to appellant's attention in the pretrial order.

The judgment of the trial court must be affirmed.

Respectfully submitted,

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